UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

FEDEX GROUND PACKAGE SYSTEM, INC. d/b/a FEDEX HOME DELIVERY Employer and	Case 4–RC–20974
FXG-HD DRIVERS ASSOCIATION Petitioner	

REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION

I. PROCEDURAL HISTORY

The Petitioner, FXG-HD Drivers Association, filed the petition in this case seeking to represent a unit of Pick-up and Delivery Contractors (the Contractors) employed by the Employer, FedEx Home Delivery, at a facility in Barrington, New Jersey. The Employer took the position that the Contractors are not employees but are independent contractors. The Employer further contended that if the Contractors were found to be employees, four Contractors who operate multiple routes and employ other Drivers to assist with these routes (the Drivers) are supervisors within the meaning of Section 2(11) of the Act and should be excluded from the unit.

A hearing was held by a Hearing Officer on 21 days between February 3 and March 7, 2005. On June 1, 2005, I issued a Decision finding that the Contractors were employees and directing an election. I further concluded that there was insufficient evidence to resolve the status of the multiple-route Contractors and directed that they be permitted to vote subject to challenge.

The Employer filed a Request for Review of my Decision with the Board. On August 3, 2005, the Board denied the Employer's Request for Review except as it pertained to the multiple-route Contractors. The Board remanded the case for "the issuance of a Supplemental Decision, including a reopening of the record, if necessary, to determine, the joint employer status of the multiple-route Contractors and the Employer, and to make a finding concerning the supervisory status of these multiple-route Contractors."

On August 10, 2005, I issued a Notice to Show Cause giving the parties an opportunity to state their positions on the joint employer and supervisory issues encompassed by the Board's

remand and to indicate whether the record should be reopened to take additional evidence with respect to these issues. Both parties filed responses.

In their responses, the Employer and the Petitioner both assert that it is not necessary to reopen the record. The Employer's response states, inter alia, that there is sufficient record evidence to support a finding that the Employer and the multiple-route Contractors jointly employ the Drivers and that the multiple-route Contractors should be excluded from the bargaining unit as Section 2(11) supervisors.[1] The Petitioner contends that the Employer has not met its burden of establishing that it jointly employs the Drivers and, as a result, has not shown that the multiple-route Contractors function as supervisors of its employees.[2]

In light of both parties' assertions that it is unnecessary to reopen the hearing to take additional evidence, a further review of the record was conducted. As a result of that review, I have concluded that there is sufficient evidence to resolve the issues remanded by the Board. As explained in greater detail below, I have further concluded that the Drivers are jointly employed by the four multiple-route Contractors and the Employer and that the multiple-route Contractors are excluded from the bargaining unit as joint employers of the Drivers and/or as supervisors of the Employer.

II. FACTORS RELEVANT TO EVALUATING JOINT EMPLOYER AND SUPERVISORY STATUS

Two otherwise separate employers are joint employers if they "share or codetermine those matters governing essential terms and conditions of employment" for a particular group of employees. *TLI, Inc.*, 271 NLRB 798 (1984), citing *NLRB v. Browning-Ferris Industries*, 691

[1] The Employer's response contends that the Hearing Officer stated at the hearing that the Region had determined that there was a joint employer relationship between the multiple-route Contractors and the Employer. This contention is inaccurate. The discussions of the joint employer issue arose in connection with the Petitioner's claim, later abandoned, that Drivers employed by multiple-route Contractors should be included in the bargaining unit. The Hearing Officer correctly noted that, pursuant to *Oakwood Care Center*, 343 NLRB No. 76 (2003), if these Drivers were employed jointly by the multi-route Contractors and the Employer, they could only be included in a unit with employees employed solely by the Employer with the Employer's consent, and that the Employer would not give such consent. The entirety of the transcript shows that the Hearing Officer did *not* indicate that the multiple route Contractors are joint employers with the Employer; she indicated that if they were joint employers, the Drivers could not be in the unit because the Employer would not consent to their inclusion. Indeed, on at least two occasions during the course of discussions regarding this issue, the Hearing Officer indicated that no finding of joint employer status had been made.

[2] Alternatively, the Petitioner asserts that the Employer should be administratively estopped from contending that the multiple-route Contractors are supervisors because it took the position at the hearing that it was not an employer of the Drivers and has never affirmatively altered this position. This argument is without merit. The Employer's primary contention at the hearing was that all of the Barrington Contractors, including the multiple-route Contractors, were independent contractors. However, the Employer also indicated that, assuming the Contractors were found to be employees, there was an issue as to whether it jointly employed the Drivers and whether the multiple-route Contractors were its supervisors within the meaning of the Act.

F.2d 1117 (3d Cir. 1982). Sharing or codetermining essential terms and conditions of employment involves, "meaningfully affect[ing] matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction." *Riverdale Nursing Home,* 317 NLRB 881, 882 (1995); *Southern California Gas Co.,* 302 NLRB 456, 461 (1991). The determination of whether two entities are joint employers "is essentially a factual issue." *Boire v. Greyhound Corp.,* 376 U.S. 473, 481 (1984).

As for the issue of whether the multiple-route Contractors are statutory supervisors, the burden is on the party asserting that supervisory status exists. *NLRB v. Kentucky River Community Care, Inc.,* 532 U.S. 706 (2001); *Fleming Companies, Inc.,* 330 NLRB 277, fn. 1 (1999); *Bennett Industries,* 313 NLRB 1363 (1994). Section 2(11) of the Act sets forth a threepart test for determining whether an individual is a supervisor. Pursuant to this test, employees are statutory supervisors if: (1) they have the authority to engage in any one of the 12 supervisory functions listed in Section 2(11) of the Act; (2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. See *NLRB v. Kentucky River Community Care, Inc.,* above, 532 U.S. at 712-713; *NLRB v. Health Care & Retirement Corp. of America,* 511 U.S. 571, 573-574 (1994).

The statutory criteria of supervisory status set forth in Section 2(11) are read in the disjunctive; possession of any one of the listed indicia is sufficient to make an individual a supervisor. See *Juniper Industries, Inc.,* 311 NLRB 109, 110 (1993). The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions; between effective recommendation and forceful suggestion; and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status on an employee. See *Juniper Industries, Inc.,* above at 110. The authority effectively to recommend an action means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. See *Children's Farm Home,* 324 NLRB 61 (1997); *Hawaiian Telephone Co.,* 186 NLRB 1 (1970). The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the protection of the Act. *Azusa Ranch Market,* 321 NLRB 811, 812 (1996). Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Phelps Community Medical Center,* 295 NLRB 486, 490 (1989). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. See *Gaines Electric,* 309 NLRB 1077, 1078 (1992); *Ohio River Co.,* 303 NLRB 697, 714 (1991), enfd. 961 F.2d 1578 (6th Cir. 1992).

III. FACTS

The Employer delivers packages from its 300 terminals throughout the United States, including the Barrington terminal. 21 routes serviced from Barrington are handled by Contractors who make deliveries for a single route, and nine routes are serviced by Contractors

who have contracted with the Employer to service more than one route.[3] Three of these multiple-route Contractors – Francis Lynch, Carlon Schaeffer, and Mike McKenzie – agreed to service two routes. One Contractor, Giacomo Andreoli, has agreements to service three routes. It is the status of these four multiple-route Contractors which remains at issue.

The Employer does not require its Contractors to deliver packages themselves. The standard agreement signed by Contractors merely obliges them to make equipment and a "qualified operator" available to provide service for the Employer. To be "qualified," an operator must pass physical and drug tests required by the United States Department of Transportation and submit to checks of criminal and driving records required by the Employer. Operators must also pass a training course at which the Employer reviews safe driving techniques and the procedures to be used in delivering packages. Among these procedures are how to load packages onto a vehicle, the most efficient methods for making deliveries, and where to leave packages if the resident is not home.

All of the multiple-route Contractors handle one of their routes themselves while employing Drivers to make deliveries on their second or third routes.[4] The multiple-route Contractors select their own Drivers subject only to the requirement that the Drivers be qualified to work for the Employer. If a prospective Driver is not qualified at the time of hire, he or she must participate in the Employer's training program and pass the required physical examination, drug test, and background checks. The Contractor must pay for the physical examination and drug test, but the Employer performs the background checks without charging the Contractor. The Employer has vetoed hiring decisions made by Contractors because of the potential Drivers' failure to meet the Employer's qualifications.

The Employer pays Contractors specified amounts for each stop made and package delivered on the Contractors' routes, as well as various fees and bonuses. Contractors determine the amounts they will pay the Drivers. Payments made by the four multiple-route Contractors vary; some of the Contractors' Drivers are paid daily or weekly salaries while other Drivers are compensated on a per-package or per-stop basis. The Contractors are solely responsible for paying their Drivers, and they retain any difference between the amounts paid Drivers and the amounts received by the Contractors from the Employer for Driver deliveries.

Contractors supply the vehicles used by Drivers in making deliveries and pay for fuel and maintenance. Contractors are also responsible for finding substitutes in the event that their

[3] One Contractor, Edward Chang, employs a Driver on a full-time basis to service his route and only occasionally assists with deliveries. The parties agreed at the hearing that Chang should be excluded from the unit.

One route was vacant at the time of the hearing; no Contractor was permanently assigned to it.

[4] The parties agreed at the hearing that the Drivers employed by multiple-route Contractors should be excluded from the unit.

Single-route Contractors sometimes employ drivers to fill in on a temporary basis when the Contractors are absent due to illness or vacation. The Employer also employs some drivers through a labor leasing firm to handle deliveries on routes not assigned to a Contractor and in areas not included within routes. The parties agreed to exclude from the unit the fill-in drivers employed by both the Employer and the single-route Contractors.

Drivers are absent, although the Employer will provide them with the names of possible fill-ins. Some of the Drivers also may assist in finding substitutes during their absences. Contractors normally pay any substitutes, although one multiple-route Contractor required his Driver to defray part of the cost of a substitute on days the Driver wanted off. Contractors are responsible for providing workers compensation insurance coverage for their Drivers.

Drivers wear the same uniforms as Contractors and perform the same job functions. They are required to follow the same Employer-established policies and procedures that Contractors follow. The Employer determines what packages Contractors and Drivers will deliver and when the packages will be delivered. Both Contractors and Drivers must deliver all packages assigned by the Employer, and the Employer is free to require deliveries outside the routes assigned to Contractors and Drivers. The Employer has established minimum and maximum numbers of packages to be assigned each Contractor or Driver for delivery.

The Employer on a daily basis provides Contractors and Drivers with a suggested order for delivering packages and a map indicating the most efficient route to take in making the deliveries. Like Contractors, Drivers are obliged to scan each package with an Employerprovided scanner before loading the package onto the Driver's vehicle and again at the time of delivery. The Employer specifies the procedure to be followed in cases where delivery proves impossible and conducts daily audits of returned packages during which it evaluates the reasons for non-delivery. Information entered by Drivers into scanners must be uploaded into the Employer's computer system at the end of each workday. The Employer has in some cases provided Drivers with equipment needed to perform this function.

Contractors and Drivers are obliged to follow Employer guidelines when releasing packages to empty residences, and the Employer conducts periodic Driver Release Audits to make certain the guidelines are being followed. The audits involve supervisors visiting Driver stops to observe where the Driver has placed packages and what steps the Driver has taken to prevent the packages from being damaged due to inclement weather.

Customer complaints or inquiries are normally directed to the Employer which will sometimes contact Drivers directly about them. Drivers sometimes contact Employer supervisors directly with questions about deliveries.

Both Contractors and Drivers are required to report vehicle accidents to the Employer, which conducts an investigation and prepares a report regarding the accident. If the Contractor or Driver is deemed responsible for the accident, Employer representatives accompany the Contractor or Driver on a Safety Ride during which the representatives evaluate their driving techniques. Employer representatives also conduct up to four Customer Service Rides per year during which they evaluate the job performance of Contractors and Drivers.

The Employer notifies Contractors if their Drivers are not performing adequately. A Contractor who persists in using an unsatisfactory Driver may have his or her contract terminated by the Employer. Contractors can terminate the employment of their Drivers without seeking the Employer's approval. Multiple-route Contractor Mike McKenzie testified that he terminated a

Driver because of complaints from the Employer about the Driver's refusal to do more than 100 stops per day.

IV. ANALYSIS

A. Joint Employer

I find that both the multiple-route Contractors and the Employer meaningfully affect matters relating to the employment relationship of the Drivers. The multiple-route Contractors are primarily responsible for hiring the Drivers and setting their compensation. They also have the authority to terminate the Drivers' employment. The Employer, for its part, sets minimum qualifications for the Drivers and retains the right to deny a Contractor the right to hire a Driver who fails to meet those qualifications. The Employer also trains the Drivers. See *J.E. Higgins Lumber Co.,* 332 NLRB 1172, 1176 (2000). The Employer assigns the Drivers work and exercises substantial control over their performance of that work through policies and procedures which the Drivers are obliged to follow. The Employer informs Contractors of problems with Driver performance and can terminate the Contractor and Driver if problems persist. The Drivers are required to wear the Employer's uniform. In short, I conclude that the multiple-route Contractors exercise sufficient control over the conditions of Driver employment to be considered a joint employer of the Drivers along with the Employer. *Le Rendezvous Restaurant,* 332 NLRB 336 (2000); *International Transfer of Florida, Inc.,* 305 NLRB 150 (1991). Accordingly, the multiple-route Contractors are excluded from the unit as employers of the Drivers. See *Schnabel's Drivers for Lease,* 249 NLRB 1164 (1980).

B. Supervisory Status

Alternatively, I find that the multiple-route Contractors supervise the Drivers and would be excluded from the unit on that basis also. See *Pacemaker Driver Service,* 269 NLRB 971 (1984); enfd. in relevant part, sub nom. *Carrier Corp. v. NLRB,* 768 F.2d 778 (6th Cir. 1985). The multiple-route Contractors hire and fire their Drivers and set the Drivers' rates of pay. These are all indicia of supervisory status under Section 2(11) of the Act. *Union Square Theatre Management, Inc.*, 326 NLRB 70, 71, fn. 12 (1998). It is true that the Drivers are non-unit personnel, but the Board will find supervisory status where the monitoring of non-unit employees is part and parcel of an individual's primary work product rather than an ancillary part of his or her duties. *Union Square Theatre Management, Inc.,* above. As Contractors are responsible for the delivery of packages on their routes, if a Contractor acquires a second route, this necessarily involves the hiring and management of a Driver to service the extra route. The Employer's assignment of the second route comes with the implicit understanding that the Contractor will supervise the second route Driver. Thus, Driver supervision in this circumstance is part of the multiple-route Contractor's primary work product. The fact that the Drivers are not included in the same bargaining unit with Contractors does not preclude a finding that the multiple-route Contractors' exercise of authority over the Drivers makes the Contractors statutory supervisors. *Pepsi-Cola Co.,* 327 NLRB 1062, 1063 (1999).

Cases such as *Tiberti Fence Co.*, 326 NLRB 1043 (1998) and *Gulf Bottlers, Inc.*, 127 NLRB 850, 860 (1960), do not compel a different conclusion regarding the supervisory status of the multiple-route Contractors. In *Tiberti* and *Gulf Bottlers*, the Board declined to find individuals to be statutory supervisors based on their optional employment of assistants at their own financial risk. The Board reasoned that since the employment of the assistants was neither required nor paid for by the employer, it had not been undertaken in the interest of the employer and could not provide a basis for a finding of supervisory status under Section 2(11).

In contrast, the employment of the Drivers is not optional and the Drivers do not assist the Contractors in the performance of the Contractors' work functions. Rather, a second route requires a Driver, and the Drivers work independently of the Contractors. Further, since the Drivers are essential to the performance of services on their routes, their employment is in the interests of the Employer and is not merely for the convenience of the multiple-route Contractors. See *Pepsi-Cola Co.*, above.[5] In short, I find that the multiple-route Contractors perform supervisory functions in the interest of the Employer, and I shall also exclude them from the unit as supervisors within the meaning of the Act.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. A request for review may also be submitted by E-mail. For details on how to file a request for review by E-mail see http://gpea.NLRB.gov/. This request must be received by the Board in Washington by **October 5, 2005.**

Signed: September 21, 2005

at Philadelphia, PA

/s/ [Dorothy L. Moore-Duncan]

DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

[5] This contrasts with the single-route Contractor who hires a helper to assist with the loading of his truck or a driver to fill in while the Contractor is on vacation. Employment of the helper or driver in these circumstances is for the convenience of the Contractor and does not establish supervisory status.